

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: NUVARING PRODUCTS)
LIABILITY LITIGATION)
)
) Case No. 4:08-MD-01964 RWS
)

STATUS HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
JULY 13, 2011

APPEARANCES

For Plaintiffs: Kristine Kraft, Esq.
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(Appearances continued on page 2)

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(PROCEEDINGS STARTED AT 10:35 AM.)

THE COURT: Good morning. We're here this morning in the case styled *In re: NuvaRing Products Liability Litigation*, Cause No. 4:08-MD-1964. Would counsel make their appearances, please?

MR. DENTON: Good morning, Your Honor. Roger Denton, Kristine Kraft, and Megan Vanderbeek from my office for the plaintiffs.

MS. GEIST: Morning, Your Honor. Melissa Geist from Reed Smith for the defendant.

MR. BALL: Dan Ball, Bryan Cave, for defendants.

MR. YOO: Thomas Yoo also for defendants.

MR. STRAUSS: Steve Strauss also for the defendants.

THE COURT: Very good. We are here today on a prescheduled or scheduled status conference. I have the recommended agenda items from the parties, so we'll take them in order unless there are any announcements before we get started.

Ms. Geist? Ms. Kraft?

MS. KRAFT: No announcements.

MS. GEIST: No, Your Honor.

THE COURT: All right. Ms. Kraft, from your filing we have, No. 1, deadline for defendants to supplement discovery responses, including updated custodial files.

MR. DENTON: If I can?

1 THE COURT: Mr. Denton, all right.

2 MR. DENTON: Good morning, Your Honor.

3 THE COURT: I assumed Ms. Kraft was in charge. I
4 apologize.

5 MR. DENTON: She has always been in charge, Your
6 Honor, but I ran over here early and had a discussion with Ms.
7 Geist and Mr. Ball to try to put some definition of this
8 issue.

9 From our perspective, Your Honor, we believe, and the
10 Court has previously indicated the obvious, that the federal
11 rules require the defendant to make reasonable supplementation
12 of discovery to bring it current and up to date. Defendants
13 have not, obviously disagreed with that, but the issue is the
14 timing and how we're going to get all this done, given the
15 fact that we're working on expert reports right now and
16 there's ongoing activity on this product.

17 We discussed some mechanism shortly before the
18 hearing that may lead us to a resolution of this, although I
19 have some concerns about the timing. For example, one of the
20 big concerns I have, there is an ongoing safety study that the
21 company is sponsoring and paying for, and they send periodic
22 reports. We have not had a report on that, I believe, since
23 December of 2010. We know they had a meeting in June, a
24 committee meeting, and we believe they've recently
25 corresponded some of this information to the FDA and probably

1 the European regulators. We haven't seen it yet. They're not
2 disputing we're going to see it. My concern is when, in light
3 of the fact that our expert reports are due in a couple of
4 weeks and depositions will take place, and I'm trying to avoid
5 a situation that additional information comes out after our
6 experts are deposed and then they will need to supplement
7 reports in supplemental depositions. I'm trying to avoid some
8 of that and that's my concern, and that's just an example.
9 And we're trying to see if we can work this out after the
10 hearing, but I'm not sure yet if we're going to be able to do
11 that. So that's basically the situation.

12 THE COURT: So you're cautiously optimistic but
13 afraid?

14 MR. DENTON: I'm not sure I'm any of those, Your
15 Honor, but --

16 THE COURT: Fearful. Maybe "afraid" is too strong.
17 Fretting.

18 MR. DENTON: No. What I'm really trying to do is
19 save all of us some time and money in trying to do this as
20 efficiently as we can on both sides.

21 THE COURT: Right, I mean, because this isn't the
22 kind of thing I can be involved in on a regular basis.

23 MR. DENTON: Correct.

24 THE COURT: Ms. Geist, do you have anything to add to
25 that?

1 MS. GEIST: Thank you, Your Honor. Nothing much more
2 than what Mr. Denton already said; although, I am certainly
3 optimistic, Your Honor, we are going to work this out. We
4 talked about timing. We talked about starting our
5 supplementation of the custodial and other files consistent
6 with the federal rules, beginning middle of August. We would
7 complete that in the fall, and then we would do the process
8 again in February for further updating. So the parties, I
9 think, Your Honor, are going to be able to work this out.

10 THE COURT: I mean, Mr. Denton has this -- it's the
11 fear of the unknown, not that he's afraid, but there's the
12 fear of the unknown that is always a problem. It's usually
13 the fear of the unknown is greater than the reality. You
14 actually have a better idea about what we're talking about.

15 I mean, you understand that the pressures on the
16 parties and the court to continue to move forward are
17 substantial, and one of the things that can most likely create
18 a detour is that these studies provide a substantial amount of
19 new information or it's substantially substantive information
20 between your client and the FDA that does cause us to have to
21 stop, supplement experts' reports and do expert depositions
22 again, which nobody wants to do.

23 MS. GEIST: Certainly, Your Honor. And with respect
24 to the studying question, that is, the TASC study, we --
25 keeping these points in mind that the Court just made, we have

1 continued to supplement with respect to the TASC study on an
2 ongoing basis. I believe we are essentially current, Your
3 Honor, as to the TASC study. Mr. Denton is correct. There
4 was a meeting in June. There was a very recent, over the last
5 week or two, submission to FDA for an interim report on the
6 TASC study, and we would certainly be providing that to
7 plaintiffs' counsel by mid August, if not before.

8 THE COURT: Because you uniquely know if this is the
9 kind of information that's really going to have an effect or
10 it's like, well, we kind of knew all that. We just got to
11 keep going forward.

12 MS. GEIST: Part of the discussion that we had, Your
13 Honor, too, is to assist plaintiffs' counsel so I'm not the
14 only person who knows the types of documents we're talking
15 about. We're happy to provide counsel with a list of the
16 current custodians for whom we'll be supplementing and the
17 different databases, the centralized databases that we'll be
18 supplementing as well, just so we're all on the same page.

19 THE COURT: Mr. Denton, are you okay with that so
20 far? Do you remain optimistic?

21 MR. DENTON: I remain optimistic so far, Your Honor.

22 THE COURT: All right.

23 MR. DENTON: But we're going to talk after the
24 hearing.

25 MS. GEIST: Yes. Thank you, Your Honor.

1 THE COURT: All right. Both parties have on their
2 agendas the stipulation regarding Rule 26 and that it should
3 apply to experts in this case, the new rule.

4 Mr. Ball?

5 MR. BALL: This was a topic of discussion when we
6 were here in May. After that, the parties reached a
7 stipulation. I prepared a order for presentation to the Court
8 and found out that I had a typographical error in it, so we
9 will be submitting that. We can submit that to you
10 electronically later today.

11 THE COURT: It's one of the few places people still
12 have Wite-Out, you know, for jury instructions, you get
13 halfway though an instruction and realize that something is
14 wrong and you don't want to stop and leave while the jury's in
15 the box. So I still have Wite-Out around if that will solve
16 the problem.

17 MR. BALL: I think it would be easier if I just get
18 it typed and submitted later today. There is no controversy
19 about it. The parties have agreed that the 2010 amendments to
20 Rule 26 as they pertain to experts will apply to all the cases
21 in the MDL and, in fact, all of the pending NuvaRing
22 litigation. So that's where we are in that issue.

23 THE COURT: All right.

24 MR. DENTON: Yes, Your Honor. The plaintiffs agree
25 to that.

1 THE COURT: All right. Moving on to then Ms. Geist's
2 submission. The first one was the Rule 26. Second was
3 stipulation regarding depositions after the exchange of trial
4 witness lists.

5 MR. BALL: Yeah. I had -- the same proposed order I
6 just spoke of also includes that as a stipulated order that
7 we'll present to the Court later today. Essentially what the
8 parties have agreed to is what was discussed at the hearing in
9 May and, that is, that 60 days before the trial date the
10 parties will exchange reasonable and good faith witness lists.
11 And if there's a witness on there that has not been deposed,
12 then the parties agree that they will make that witness
13 available within the next 30 days for a deposition so that
14 we -- part of the purpose of this was so we're not taking
15 unnecessary depositions, but we're also avoiding surprise. So
16 the parties have worked that out, and it will be a part of the
17 stipulated order that except for the typo, Mr. Denton has
18 signed off on.

19 THE COURT: Okay. Defendants' motions to enforce
20 compliance with court order regarding contention
21 interrogatories and trial pool cases.

22 MR. YOO: Morning, Your Honor.

23 THE COURT: Mr. Yoo, how are you?

24 MR. YOO: I'm good, thank you.

25 We, on July 1, filed, I believe, seven motions

1 relating to the Court's order from back in December of 2010.

2 The plaintiffs' opposition was due, I believe, on July 8.

3 Instead of filing an opposition, they filed a motion seeking
4 additional time to respond to the motion and suggesting that
5 they would get that on file mid August, about two weeks after
6 their expert reports are due.

7 I'm not sure how the Court wants to deal with that
8 today, but from our perspective, this relates to basic
9 discovery that was propounded back in April of 2010 when
10 case-specific discovery got started. Your Honor will recall
11 that we had some issues with the vagueness of the pleadings.
12 I thought the parties were in agreement with the Court that
13 case-specific discovery would be the time to discover the
14 plaintiff-specific facts and bases for everyone's claims, so
15 we started by propounding discovery directed at those issues.

16 The initial response from the plaintiff was, we're
17 not going to respond, period, because you have plaintiff fact
18 sheets.

19 We had to file a motion to compel responses. The
20 Court, in December of last year, granted the motion and
21 ordered plaintiffs to provide responses I believe on a
22 staggered basis, with responses being due in January and
23 February.

24 We then got responses which essentially are not
25 factual, they don't contain any evidence, it's just conclusory

1 allegations, number one; and number two, they're virtually
2 identical conclusory allegations across all seven plaintiffs'
3 firms, across all of the trial pool plaintiffs. That simply
4 cannot be.

5 From our perspective, it has basically made a mockery
6 of the discovery that was propounded and is not compliant with
7 the Court's order. We attempted meet and confers. Those were
8 not successful, so we had to file a motion.

9 It's pretty clear to us that what's going on here is
10 plaintiffs don't want to provide the factual evidence
11 supporting each of the trial plaintiff's claims. They have
12 told us in their discovery response and have pretty much said
13 it again in their motion to extend their time to respond that
14 they don't want to provide this information; rather, we should
15 just wait and read their expert reports.

16 That's problematic for us on many levels. That's,
17 number one, not compliant with the rules. Number two, it's
18 not fair to us. As I think Your Honor can appreciate, expert
19 discovery can be a little bit tricky. Experts are allowed
20 leeway. They're obviously offering opinions. We need to know
21 going in to expert discovery whether there's a factual basis
22 or not. Plaintiffs have made a deliberate attempt here, I
23 think, to not provide us those factual bases.

24 So we are in a situation where we were entitled to
25 this information about a year ago, we have already gone

1 through motion practice, we've now had to file a second set of
2 motions, we don't have resolution, we have no factual
3 information on a plaintiff-specific basis. I will also add
4 that this week we had to file another wave of motions related
5 to a subsequent set of similar type of discovery that was
6 propounded, requests for admissions with attendant
7 interrogatories and requests to produce. The request for
8 admissions went something like: Admit that you have no
9 evidence that your NuvaRing that you used --

10 THE COURT: I read them as contention requests for
11 admissions.

12 MR. YOO: That's right. And we don't have any
13 information there either. We got the same response, which is:
14 Read our expert reports; it will be in there.

15 We think fundamentally that's defective, that's not
16 compliant with discovery obligations, that's not compliant
17 with the Court's order.

18 So at this point, I'm not sure what the best remedy
19 is. We just want to know what the factual bases are on a
20 plaintiff-specific basis. This relates only to the trial pool
21 plaintiffs. We should have had that information a long time
22 ago. We would like it immediately. We would like it before
23 we get plaintiffs' expert reports.

24 MR. DENTON: Thank you, Your Honor. First of all, we
25 have not yet had a chance to file a written brief, and we

1 believe our answers are appropriate. We find it odd that if
2 the defendant got our answers in January and February, they
3 just now bring it to the Court right after the 4th of July
4 holiday, while we are in the process of working day in and day
5 out to get these expert reports done in July, and it really is
6 a burden. But the motion isn't ripe yet. We have a right to,
7 and we'd request the right, to respond.

8 The same goes for the motion on the contention
9 requests for admission. That motion, I think, was just
10 filed -- it was filed on the 12th.

11 THE COURT: Yesterday.

12 MR. DENTON: Yesterday. So we clearly haven't had an
13 opportunity to respond to that. But we have a fundamental
14 disagreement, without waiving other arguments that we will
15 brief, that, A, these are not general -- that there's somehow
16 case-specific issues. I think there are, but many of these
17 issues, Your Honor, whether the products are defective,
18 whether the products are designed defective, whether or not
19 the label is adequate, whether or not there was
20 misrepresentations to the regulatory bodies, and a list of
21 issues are generic and general to all plaintiffs.

22 To say that a particular plaintiff or particular
23 doctor is unique or different than all doctors on some of
24 these points, is inappropriate and probably nonexistent.

25 Clearly, we are required and will set forth very

1 detailed bases for any opinions of any experts, and that will,
2 in large part, give the defendants what they need.

3 The other thing, Your Honor, is the so-called
4 contention interrogatories that say something like this:
5 Please admit you have no evidence of basically our entire
6 case.

7 I guess we could, in response, file a request to
8 admit and admit you have no evidence that you properly warned
9 any particular doctor in the United States.

10 It seems to be that that's not the type of fact that
11 the rule contemplates. If there is a specific fact or a
12 specific document, that's one thing, but to basically say,
13 admit you have no work product -- I mean, it is our work
14 product -- or to admit you have no evidence, we don't think is
15 proper under the rules, and we'd like to offer you some case
16 law in that regard in response to this. In large part this is
17 going to be a moot issue in my mind. Our reports are due
18 August 1?

19 MS. KRAFT: Right.

20 MR. DENTON: August 1. And we intend and we'll make
21 that deadline.

22 The other thing, Your Honor, is discovery is ongoing.
23 There's no way that we're going to be able to, for example, on
24 the safety studies say we know all the evidence at this point.
25 The evidence is ongoing, and the defendants have stood up

1 today and told you, as of this time, there's evidence that we
2 have not yet had. I'm not faulting them for not giving us the
3 evidence yet, but then to turn around and say, tell us every
4 piece of evidence you have that supports an issue, we think is
5 inappropriate.

6 So our view is, these are not ripe for judicial
7 resolution, we will respond if needed, and intend to, and then
8 the Court can tell us in its order what we should be doing,
9 but we believe there is no surprise here. They know what the
10 issues are. They've attended the depositions. They certainly
11 will know our positions when they get our expert reports in
12 15, 16 days, something like that. I may have the math wrong.
13 Eighteen days maybe. And that's generally where we're at.
14 Thank you, Your Honor.

15 MR. YOO: Your Honor, from what I just heard from Mr.
16 Denton, I mean, that's an argument against contention
17 discovery in general. It's an argument against fact discovery
18 as opposed to expert discovery. I don't think there's any
19 basis for that. We're entitled to this information. We asked
20 it at the beginning of case-specific discovery, and they have
21 apparently done a successful job of not giving it to us until
22 now. And I just heard Mr. Denton tell the Court again that
23 they don't want to do this; that it's moot because it will be
24 in the expert reports.

25 Obviously, the experts, before they can give an

1 opinion in a specific case, has to consider the facts and the
2 bases for the claims. So they're presumably providing the
3 experts with something. They should be giving that to us.
4 They should have given it to us already in fact discovery.

5 The argument that the cases are all pretty much the
6 same, I just don't think that gets out of the gates. We're
7 talking about stroke cases, pulmonary embolism cases, DVTs,
8 plaintiffs in their twenties, plaintiffs in their forties,
9 plaintiffs who used the product for a month, plaintiffs who
10 used it for three years. How could it be identical across all
11 cases?

12 Let me give you one example. Our discovery asked:
13 Set forth all facts and bases that support your contention
14 that your alleged injury was caused by your use of NuvaRing.

15 Answer. This is across all plaintiffs and all firms.
16 Plaintiffs medical records -- excuse me. Plaintiff's medical
17 records, medical literature on VTE. Note, it is also expected
18 that experts whom plaintiffs hired hereafter will give support
19 on causation. What are we supposed to do with that? That
20 isn't fact discovery. And that's in no way complying with
21 this Court's December 2010 order telling plaintiffs that they
22 have to provide the case-specific facts.

23 Plaintiffs' motion for an extension of time to
24 respond, Your Honor, cites an undisclosed scheduling conflict
25 and asks for another month. They've already had two weeks

1 since the time we filed our motion to get a response on file.
2 They've not done that. With an undisclosed scheduling
3 conflict that apparently prevents every lawyer at seven
4 different law firms, representing twenty-some plaintiffs, from
5 responding to any of this until two, three weeks after their
6 expert reports are due, I think just proves the point. I
7 think we're caught in some gamesmanship here and we're --

8 THE COURT: Mr. Denton, how about it? When are we
9 going to -- I mean, what we're talking about now is your
10 response to the motion before I can even get to it. I mean,
11 you know my predisposition. I'm not going to treat this case
12 any different than I would any other. You have the right to
13 respond, but you know, it's not going to take you six more
14 weeks to write a response to this.

15 MR. DENTON: Well, the reason for that, Your Honor,
16 is, is that all of those firms are in seven-day-a-week mode
17 trying to get these expert reports done. That's what this is,
18 and we see the timing of this frankly from our perspective in
19 teeing this up in July, when it was apparently, from their
20 view, ripe in January or February, is nothing but a
21 distraction from us getting our work at hand.

22 We would like to, if we have to deal with this, get
23 the reports done and then deal with it because it will take
24 time to respond to every single one of these, and I can tell
25 you that those firms are working seven days week. We had a

1 meeting Sunday, all day Sunday on experts, and different
2 things vetting certain things, and so it is a process we are
3 very much engaged in, and you know, I'd tell the Court that
4 over the last couple of years we've had many, many times where
5 the defendant has asked for months, if not longer, to respond
6 to discovery matters. And so I don't think this is
7 unreasonable under the circumstances.

8 THE COURT: I'm not even talking about responding to
9 the discovery. The question on the table now is your response
10 to their motion.

11 MR. DENTON: Okay.

12 THE COURT: I mean, this is putting a little sand in
13 the cogs here, because if you wish to be heard on their
14 motion, you have to be heard on their motion. Only then can I
15 tell you what the scope of your response needs to be.

16 MR. DENTON: Correct.

17 THE COURT: I mean, you already have a theory about
18 why you shouldn't have to answer these interrogatories or why
19 your answers are sufficient or what it is you're going to do
20 to fix it.

21 MR. DENTON: Correct.

22 THE COURT: That's a little different than providing
23 all the information. I assume you're kind of conceding that
24 there needs to be more information provided to the defendant;
25 otherwise, this wouldn't be a big burden. You just say, I win

1 because, and I don't have to answer this.

2 MR. DENTON: Well, I think there is a burden on all
3 these firms. And let me just tell you, Your Honor, I don't
4 think this is limited to the seven trial cases. They've filed
5 this motion on all 24 cases. So we have to -- is that
6 correct?

7 MS. KRAFT: Yeah. Definitely on the first motion
8 pertaining to reports on the Court's prior order, No. 3 of
9 their agenda.

10 THE COURT: At a minimum, obviously, we have to focus
11 on the eight cases that have been teed up for trial.

12 MR. DENTON: Right, right. And that would be a
13 reduction of our response. You know, if the Court is
14 asking --

15 THE COURT: I'm at a loss as to why it would be
16 easier to respond to eight instead of twenty-three if your
17 view is, is that is a universal problem.

18 MR. DENTON: Well, I think it is, but it also
19 involves other law firms, Your Honor, that I don't know what
20 their schedule is. And I can't respond for another law firm
21 and their client as to what they want to do. I can respond to
22 my clients, obviously, and I will do that. You know, if the
23 Court would give us until next Friday to file a responsive
24 brief, we'll get it done somehow.

25 THE COURT: Well, let's do it by next Friday.

1 MR. DENTON: All right.

2 THE COURT: Then, obviously, I'll expect to hear from
3 Mr. Yoo as to whether you intend to file a reply or you deem
4 it submitted. Let me know. I assume you'll want to reply.
5 You've never been at a loss for words before.

6 MR. YOO: Why don't we get our reply on file by the
7 following Thursday.

8 THE COURT: Okay. That will be helpful.

9 Okay. Does this really overlap us into the fourth,
10 which is the motions -- I take it, Ms. Geist -- I'll wait.

11 MR. YOO: Your Honor, No. 4 relates to the --

12 THE COURT: All the material that was filed
13 yesterday?

14 MR. YOO: Yeah.

15 THE COURT: So we just have to take some time here.

16 MR. YOO: Yeah. I would assume that plaintiffs will
17 respond timely to those.

18 THE COURT: And you'll reply. And we may need to get
19 together sooner rather than later at some point; although,
20 with your expert schedule I'm not here to mess that up, but we
21 will find a time to get together to bring some of this to
22 closure.

23 MR. YOO: Thank you, Your Honor.

24 THE COURT: Motion for protective order regarding
25 certain requests for admissions.

1 MR. BALL: Yeah, Your Honor. We have had some
2 discussions, Roger and I have had, about this issue. Here's
3 what the background is briefly. You may recall in May there
4 was a discussion about foundation for certain company
5 documents and there was some discussion about how we're going
6 to go about doing that. We are not going to just give a
7 blanket agreement that every single document is a business
8 record admissible, et cetera. So the plaintiffs filed over a
9 thousand requests for admissions. We are endeavoring to
10 respond to over a thousand of them. We have approximately a
11 hundred and something that are set forth in the motion that we
12 are asking the plaintiff to withdraw or the court to strike as
13 a part of our protective order and here's why.

14 The other thousand that are not the subject of the
15 motion essentially are one or two or three pieces of paper or
16 maybe ten pages, or something like that, and we're responding
17 to those.

18 The ones that are subject to this motion, they have
19 hundreds, thousands, tens of thousands, hundreds of thousands,
20 or --

21 THE COURT: You want them to be more particularized
22 in their request?

23 MR. BALL: Well, particularly when they get up to a
24 million.

25 THE COURT: Right.

1 MR. BALL: And I've had discussions with them about
2 this with Roger. He has not said he won't withdraw them and
3 start over with these. He hasn't said he will. So we filed
4 the motion for protective order. We have an extension, an
5 agreed extension, to the end of this month to respond to the
6 other thousand, but we put this protective order on place with
7 the ones that are too burdensome and voluminous, and all we
8 ask is that they go through and actually identify the ones
9 that they really need responses to, and we'll respond as we
10 are in the others.

11 MR. DENTON: Your Honor, I have been working with
12 them and I, frankly, gave them an extension of time
13 voluntarily, so I just want that out there. But there are a
14 couple of things that are problematic here. It would seem to
15 me that -- some of these are large, but they're categorized in
16 a custodian file; so Dr. So-and-So, this is her custodial
17 file, and these are the documents from that file.

18 A couple of things ought to be self-evident: One,
19 that any copy they produce to us should be authentic; and two,
20 they should be willing to admit that they came from that
21 custodial's file. That's a blanket, generic, across the board
22 and some of these files are very large, but we shouldn't need
23 to, in those, to go document by document. And that's
24 problematic, and we sent an amended request to clarify some of
25 that.

1 Other things like the NDA, the submission to the FDA,
2 very, very large file. This should not be one that we have a
3 problem with even though there's many pages. There is what
4 you submitted, this is authentic, and was done.

5 In fact, this is typically done in litigation when
6 the documents are produced that there's a verification that
7 the documents are authentic copies and came from a certain
8 file. They ought to be willing to do that. To this day, they
9 have not agreed to do that.

10 Beyond that, if we have to go document by document as
11 to whether or not an e-mail sent from one high-level employee
12 to another high-level employee was in fact done in the
13 ordinary course of business at the time and date on that
14 e-mail to lay a business record foundation, I think that's
15 what they're suggesting that we do, and it just seems onerous.

16 And I'm willing to try to work with them to get
17 through this, but I don't want to be stuck with an obvious
18 document that should otherwise be admissible that we don't
19 have a proper foundation and have an objection. And frankly,
20 I'm trying to avert this before we are, you know, a few months
21 before trial, because if there are legitimate objections they
22 raise, I may need to take, and would take, a foundation-type
23 deposition.

24 And I want this sorted out now, not months from now.
25 And so we need to try to work through that, but I don't know

1 if I go through and, for example, take the extreme and have a
2 separate request for admission for all one point million
3 documents, does that solve any problem?

4 If that's what they want, we can go through that
5 exercise, but it seems to me the substantive issues are still
6 there. So we need to resolve this and I think that what we
7 have done is appropriate. We still haven't briefed this
8 motion and we still haven't seen their responses to the ones
9 that they are going to respond to, and perhaps that would give
10 me some sense of where we're at because there's a large
11 number, I think, documents that were marked as exhibits in
12 deposition that I believe they were going to respond to, as I
13 understand, so we can see where we're at.

14 But I'm trying to not have a hiccup or a problem at
15 the time of trial. I'm trying to do this proactively. And
16 you know, we're entitled to know if there is going to be a
17 business record objection to certain documents, and I don't
18 know how else to do it.

19 MR. BALL: I can help.

20 THE COURT: Mr. Ball knows how to do it.

21 MR. BALL: First of all, it's just sit down and
22 decide which documents you're going to be using at trial.

23 THE COURT: You know --

24 MR. BALL: I mean, a million documents -- a million
25 pages in one request is ridiculous.

1 THE COURT: No. Look, a million pages is too much.

2 We all agree.

3 MR. BALL: No --

4 THE COURT: I would much rather -- look, you're not
5 going to have a discussion among yourselves while I'm here.
6 You can do that when I'm gone. It's always good to talk, but
7 there's no reason to fuss, all right?

8 We agree. A million pages is too much. The example
9 of the NDA is a good one. You either admit that's what you
10 submitted to the FDA or it's not. Now, that is a tedious
11 task, but you probably did it at the beginning when you
12 produced it and now you just need to verify that what he's
13 identified -- you identified in those Bates stamps are still
14 the Bates stamps everybody is using and in fact that's what it
15 is. And I suspect you'd much rather have Ms. Geist, or I
16 assume you've locked Ms. Weissman in some basement somewhere
17 in California, making that decision than have him take a
18 deposition of somebody at the company and go through it with
19 them. You don't want to do that.

20 MR. BALL: No.

21 THE COURT: So you have a meeting of interests here.

22 MR. BALL: That's not the issue. The issue is, with
23 all due respect to Roger --

24 THE COURT: Oh, oh, oh, you just tripped over the
25 trap door, okay? Any sentence that starts with "with all due

1 respect" is a very, very bad one.

2 MR. BALL: Then I withdraw that. Nothing was wrong
3 about what he was saying.

4 THE COURT: Nothing good comes after "with all due
5 respect." You might as well call him a name and move on.

6 MR. BALL: He didn't quite appropriately say what his
7 requests say. His requests don't say, please admit this is
8 the custodial file of Joe Smith. They ask us every single
9 document's authentic, every single document was prepared in
10 the ordinary course of business, every single document was
11 prepared by a person with knowledge of the events at the time
12 and the opinions stated in there are accurate. That's -- so
13 that's the problem.

14 THE COURT: Mr. Denton, why don't we approach. We
15 can solve this right now. I'll save you writing a response.
16 You understand the point, too. His point is well taken.

17 MR. DENTON: Well, I understand that, but he's not --
18 apparently hasn't read the amended request that we sent him a
19 week ago.

20 MR. BALL: I have no knowledge of any amended
21 request. I have knowledge of requests that you sent in the
22 state court cases that are better but not there, but I have no
23 knowledge of --

24 THE COURT: Okay. So you need to send out an amended
25 request if you haven't otherwise. So if you haven't already,

1 you're going to send out an amended request. With all due
2 respect, Mr. Ball.

3 MR. DENTON: Absolutely. But they've been identical
4 in every case. And for them to suggest --

5 MR. BALL: No, no, no, Roger. I'm sorry. The MDL is
6 different than --

7 THE COURT: I think that you all can work this out
8 because, you know, a million is too many. Mr. Ball feels
9 strongly that a million is too many. Mr. Ball also knows he
10 doesn't want you taking depositions of random people to
11 authenticate these documents if you haven't already done so,
12 and you just need to identify by custodial files or other
13 discrete categories these records, and then we'll get it done.

14 MR. DENTON: Okay.

15 THE COURT: And if you need to do amended requests,
16 and if you haven't already done so -- because apparently Judge
17 Martinotti feels pretty oppressed by your document production
18 issues.

19 MR. DENTON: I don't know. I have not appeared in
20 front of Judge Martinotti, so I can't answer that, Your Honor.

21 THE COURT: Maybe you haven't had the pleasure.

22 MR. DENTON: Oh, I've been in front of him one time
23 early on, but not recently.

24 THE COURT: Off the record.

25 **(DISCUSSION OFF THE RECORD.)**

1 THE COURT: We're back on the record. Use of
2 treating physicians as experts and consultants. By the way,
3 what did you do to Ms. Weissman?

4 MS. GEIST: She has moved on to other matters, Your
5 Honor.

6 THE COURT: Okay.

7 MS. GEIST: She's not in the basement, Your Honor.

8 THE COURT: I thought you locked her in the boiler
9 room.

10 MR. YOO: Your Honor, Issue No. 6 relates to our
11 consulting with a physician in the medical community as an
12 expert. It turns out he treated one of the plaintiffs in the
13 litigation. We have not discussed with the doctor any issues
14 relating to that plaintiff. We have not invaded the
15 physician-patient privilege. But as a professional courtesy,
16 and to avoid any misunderstanding down the road, we alerted
17 Mr. Denton to the situation but, apparently, we're not seeing
18 eye to eye. Plaintiffs object to our consulting with anyone
19 who has treated any plaintiff on the litigation.

20 We think that's unfair. We can't be hamstrung from
21 meeting with perspective experts. We don't intend to discuss
22 ex parte any issues relating to a patient of theirs who
23 happens to be a plaintiff in the litigation. So we don't
24 think we're doing anything wrong, but since the issue has come
25 up, we wanted to raise it for the Court's attention.

1 THE COURT: All right. Mr. Denton?

2 MR. DENTON: Your Honor, I was somewhat surprised
3 this was on the agenda because there's no pending motion, but
4 Mr. Ball did send me an e-mail to this effect, I want to say,
5 seven to ten days ago. I told him that we strongly object to
6 it, there's case law on it, and it needs to be handled. But
7 there are a number of cases that would preclude this. In
8 short, Your Honor --

9 THE COURT: This is easy then. I'm going to give you
10 each ten days to file simultaneous briefs with me about what I
11 should do. We agree that you've -- you know, we're seeking to
12 retain as an expert a physician who treated one of the
13 plaintiffs, right? But nobody has tripped over the Chinese
14 wall of any knowledge about the individual plaintiff, so what
15 is the consequence or result? And I don't think that's --
16 there's no reason to do back and forth. I assume you want to
17 know sooner rather than later.

18 MR. YOO: That's fine, Your Honor.

19 THE COURT: Why don't we do simultaneous briefs in
20 ten days. If someone feels, oh, my gosh, I really got to
21 respond to that, which I suspect will happen, file a quick
22 motion and within the week, you know, ten days to brief it,
23 seven days to respond. I'll take it as submitted within three
24 weeks. How's that?

25 MR. YOO: Thank you, Your Honor.

1 THE COURT: That brings us to replacing of dismissed
2 MDL trial pool cases. We haven't lost any of our final eight,
3 have we?

4 MS. GEIST: No, Your Honor. We have not. The final
5 eight remain, at least at this point, in the litigation. Our
6 concern is, Your Honor, there is now an imbalance in the
7 inventory of bellwether cases. As the Court is aware, we
8 started off with 25 cases. We spent a long time discussing
9 this with Your Honor that this would be the appropriate number
10 to ensure that as we move forward in the litigation and cases
11 necessarily drop out due to motions, or for whatever other
12 reason, we have enough cases worked up so that we don't need
13 to go back to the beginning.

14 We have lost three cases on the defense side -- the
15 Easter Brown, Jennifer Anderson, and Sherrika James case. So
16 at this point, Your Honor, when you look back at the pool of
17 cases in the bellwether inventory, there's an imbalance.
18 There are three less defense picks originally. So what we
19 would like to do, Your Honor --

20 THE COURT: The thing that I would be most angst
21 about is whether they were all stroke cases, DVTs, or what
22 were the nature of the injury alleged, because one of my
23 greater concerns is if the cases reflect a cross section of
24 the results. You know, we'd all end up with all stroke cases
25 in the end, and that makes it impossible to have any jury

1 experience with a DVT or a heart attack. Do you follow me?

2 MS. GEIST: I do, Your Honor. I do. I'd have to
3 actually look up, Your Honor, which injuries are alleged in
4 those cases.

5 THE COURT: Anyway, what was your proposal? I cut
6 you off.

7 MS. GEIST: The proposal is simply this, Your Honor.
8 We have had this same issue come up before Judge Martinotti in
9 New Jersey, and when the cases dropped out, we've simply, as a
10 matter of course, been able to substitute in a new defense
11 pick. So our proposal, Your Honor, would be simply that, that
12 we go ahead and substitute in three new defense picks in the
13 bellwether pool. We would work up those cases in terms of the
14 discovery. Those would be outside of the eight trial pool
15 cases that are being worked up now for expert discovery.

16 THE COURT: Any response?

17 MR. DENTON: Again, Your Honor, I had no knowledge
18 this was going to be on the agenda until I saw it late
19 yesterday, so I would like --

20 THE COURT: Do you think this is something you can
21 work out?

22 MR. DENTON: Oh, certainly, we'll talk to them.

23 THE COURT: It certainly sounds on its face, without
24 thinking about -- oh, I'm sure you're sitting there thinking
25 of all the nefarious things Ms. Geist must be up to, but

1 there's a way -- I mean, it would be whoever lost a case would
2 substitute a case.

3 MR. DENTON: Except my -- I have no problem with
4 that, but at this point let's focus on the seven that we have
5 worked up for trial instead of adding three more in for
6 discovery for whenever, many years from now. It just seems
7 like this isn't the time to take that up. There may be an
8 appropriate time, and there may be an appropriate proposal
9 that makes sense, but none of those three cases are with my
10 firm, as I don't recognize those names, I don't know the
11 nature of those cases, and we'd like to be able to discuss it
12 with them. But the timing, it seems inefficient to be doing
13 case-specific discovery on three new cases.

14 THE COURT: It also seems inefficient to stop, to be
15 honest.

16 MR. DENTON: For what purpose, Judge? I mean --

17 THE COURT: To continue the progress.

18 MR. DENTON: We've got seven cases in the queue that
19 have to get tried before we get to whatever this next group
20 is. That will be years from now, I believe, if we try them
21 all. Certainly more than a year from now. So why the
22 expense? What's the purpose of that at this point in time?

23 THE COURT: I'll give you the same thing, each ten
24 days to tell me what you think we should do about cases as
25 they fall out, if you will, of the bellwether category. And

1 either you're going to agree or I'll pick one or the other.

2 We're going to take a short recess. We've gone
3 through the agenda, but there was the one pending motion on
4 redaction. I don't know if you intended to take that up today
5 or if you've resolved that.

6 MS. GEIST: Your Honor, I believe that's pending.

7 That is not our motion. That is plaintiffs' motion that was
8 on the agenda.

9 MR. DENTON: I'll be happy to take it up today, Your
10 Honor.

11 THE COURT: We'll reconvene in about five minutes.

12 **(COURT RECESSED FROM 11:15 AM UNTIL 11:22 AM.)**

13 THE COURT: So Ms. Kraft and Mr. Strauss, what were
14 you working on?

15 MR. STRAUSS: We were working on the --

16 THE COURT: You got to go to the podium or it didn't
17 happen. You know the rule of the room.

18 MR. STRAUSS: Yes, sir, Your Honor. Ms. Kraft and I
19 were working on potential resolutions to the request for
20 admissions with respect to authenticity of documents in the
21 large swath of documents versus custodial files and the like,
22 and we're going to continue working on that, but we think we
23 have some progress.

24 THE COURT: That's certainly workable outable.

25 MR. STRAUSS: Yep.

1 THE COURT: All right. Want to take up the redaction
2 issue? I mean, it's fully briefed.

3 MR. DENTON: Correct, Your Honor.

4 MS. GEIST: Your Honor --

5 THE COURT: But Ms. Geist has a thought.

6 MS. GEIST: That would be my motion, Your Honor,
7 certainly because it falls in the purview of documents. I
8 don't have the briefs with me, Your Honor. I was certainly
9 not prepared because it wasn't an agenda item. So I apologize
10 to the Court, but I was not prepared.

11 THE COURT: All right. Since it wasn't on the
12 agenda, I'm hard put to force the issue.

13 MR. DENTON: I'm not asking.

14 THE COURT: As much as I hate to write, I'd much
15 rather talk.

16 MR. DENTON: I would rather talk as well, but if
17 you'd like to write an order on that, that would be fine.
18 It's fully submitted.

19 THE COURT: Maybe we'll get together sooner rather
20 than later to work through, because sometimes the nuances can
21 come out in a conversation that aren't as obvious in the
22 written page, too, that --

23 MR. DENTON: Okay.

24 THE COURT: There were a couple other things that I
25 saw in the open motions list that I wanted to clean up if we

1 could.

2 Why don't you tell me, Ms. Geist, where are you with
3 Judge Martinotti, because the motion on redactions in New
4 Jersey is different than the motion on the redactions here.

5 MS. GEIST: You're absolutely correct, Your Honor.
6 It is. Here in the MDL, Your Honor, my recollection is that
7 the motion is seeking sort of --

8 THE COURT: Prospective.

9 MS. GEIST: Prospective relief only, correct. And in
10 New Jersey the relief is different. The plaintiffs' counsel
11 there is asking for sort of a redo of the entire production to
12 date. That is my general understanding of the difference.

13 THE COURT: That alone would be an MDL for heart
14 attacks, asking you to go back and redo the document
15 production in this case.

16 MS. GEIST: Yeah. I think we've already revisited
17 that issue, Your Honor, concluded that that would not be a
18 good idea. It would certainly hold things up.

19 THE COURT: Is that fully briefed in front of Judge
20 Martinotti?

21 MS. GEIST: It is fully briefed, Your Honor. Judge
22 Martinotti held oral argument on that motion and two other
23 pending discovery motions that had been filed by plaintiffs'
24 counsel by telephone. He followed up and asked for a copy of
25 the transcript of that oral argument on those three motions,

1 and I'm hopeful that he will provide us with his decision and
2 insight either before or during the case management conference
3 that we have in New Jersey next Wednesday, July 20.

4 THE COURT: Why don't you all let me know what Judge
5 Martinotti does next Wednesday because that may make this
6 moot. I mean, if he rules against you, obviously I'm the
7 least of your concerns at that point. Fair?

8 MS. GEIST: We're happy to do that, Your Honor.
9 Thank you.

10 THE COURT: We'll see where we are.

11 There's the one case that there was -- we finally got
12 to a protocol for what to do when plaintiff fact sheets aren't
13 filed, and it's very clear this is what's going to happen,
14 don't wonder, and then we dismissed Isakson, and there was a
15 motion for extension of time to provide that fact sheet and no
16 one responded on behalf of the defendant. So should I just
17 grant that? Are you familiar with that case?

18 MS. GEIST: Your Honor, I am familiar with the case.
19 My understanding, I believe it is a case being handled by Mr.
20 Rheingold who's not here today, but my recollection is that
21 things had simply crossed and he had in fact provided or was
22 in the process of providing us with a fact sheet. So I agreed
23 that we would not oppose his motion.

24 THE COURT: All right.

25 MR. RHEINGOLD: Your Honor, it's Paul Rheingold. I

1 evidently had the time wrong because I thought the conference
2 was just going to start, but I did hear Ms. Geist, and that's
3 correct.

4 THE COURT: All right. Very good.

5 And do I have any -- we did a briefing schedule on
6 the motion -- are there any protective orders that we haven't
7 said here's when you're going to file your responses, and so
8 it will be at issue?

9 MR. DENTON: I think you directed us on all of them.

10 THE COURT: Did I miss anything?

11 MR. BALL: One involving request for admissions by
12 rule you haven't --

13 THE COURT: Yeah. That was just filed yesterday.
14 There was no reason for me to mix that up.

15 MR. DENTON: Correct, correct.

16 THE COURT: Okay. Oh, you're going to work out the
17 issue as to the authentication of the documents. I didn't
18 give you a timetable for that, I don't think. That's the one
19 that I don't have a backstop for. Do you follow me?

20 MR. BALL: I believe that the plaintiffs are okay
21 with this; that while we continue to work on that issue, we
22 are not going to respond to those paragraphs that are the
23 subject of the motion for protective order, true?

24 MR. DENTON: That's true.

25 MR. BALL: And then so I guess that motion for

1 protective order can be granted until we come up with a
2 proposal to deal with --

3 THE COURT: Well, I'm not going to do anything with
4 the motion.

5 MR. DENTON: I haven't responded to it yet.

6 THE COURT: The only thing I'll assure you of,
7 though, is next time we get together if it's not resolved,
8 we're going to take it up and resolve it.

9 MR. BALL: There you go.

10 MR. DENTON: That's very reasonable.

11 MR. BALL: That's fine. And in the meantime, we can
12 respond to the request for admissions. Okay.

13 THE COURT: So not to be difficult in the expert
14 discovery phase, when is a good time for us to get back
15 together? It strikes me we do need to get together in the
16 next four to six weeks.

17 MR. BALL: We were going to suggest the week of
18 August 15, by phone.

19 THE COURT: Monday or Tuesday I'll be at the Eighth
20 Circuit conference in South Dakota. We go to such glorious
21 places.

22 MR. BALL: Then later, if we do it later in the week,
23 we can do it, but --

24 THE COURT: I'm available Thursday and Friday that
25 week.

1 MR. BALL: How about Thursday afternoon of that week,
2 which would be the --

3 THE COURT: 1:30 central?

4 MR. BALL: That would be good for us.

5 THE COURT: 1:30 central.

6 MR. BALL: What is that?

7 THE COURT: The 18th.

8 MR. BALL: Is that okay?

9 MR. DENTON: I'll make it work, Your Honor. We'll
10 make it work somehow.

11 THE COURT: Our next status conference will be 1:30
12 central on the 18th, and we'll take it from there. Anything
13 else while we are together? Telephone conference, correct?
14 Okay. Anything further?

15 MR. DENTON: I don't think so, Your Honor. I wasn't
16 clear if that on the 18th was by phone or in person. I would
17 prefer by phone.

18 THE COURT: They recommended by phone. I heard
19 telephone.

20 MR. DENTON: I did, too. I just wanted to clarify.

21 MS. GEIST: Your Honor, would anybody object to 2:30
22 central? Would anybody object?

23 MR. DENTON: Not by phone.

24 THE COURT: 2:30 central.

25 MS. GEIST: Thank you, Your Honor.

1 THE COURT: It just interrupts Mr. Yoo's lunch hour,
2 that's all.

3 MR. YOO: We have nothing else for today, Your Honor.
4 Thank you very much.

5 THE COURT: I still need to have a hearing held in
6 Muskogee before this is over, you know that.

7 MR. YOO: Sure.

8 THE COURT: Thank you all very much.

9 **(PROCEEDINGS CONCLUDED AT 11:35 AM.)**

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 41 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 21st day of July, 2011.

/s/Shannon L. White
Shannon L. White, RMR, CRR, CCR, CSR
Official Court Reporter